NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
January 22-26, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts January 22 – 26, 2024, and Posted on the New York Appellate Digest Website on Monday, January 29, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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CIVIL PROCEDURE, CIVIL RIGHTS LAW, DEFAMATION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, ATTORNEYS.

THE 2020 AMENDMENTS BROADENING THE REACH OF THE ANTI-SLAPP STATUTE DO NOT APPLY RETROACTIVELY; THEREFORE DEFENDANT'S COUNTERCLAIM BASED UPON THE AMENDED STATUTE SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's counterclaim under the anti-SLAPP statute should have been dismissed. Plaintiff, an attorney, brought this action for libel and intentional infliction of emotional distress based on letters and emails written by defendant which allegedly were intended to damage plaintiff's reputation in the legal profession. The counterclaim alleged the defendant's letters and emails were protected by the anti-SLAPP statute in the Civil Rights Law. The Second Department determined the 2020 amendments to that statute, which expanded its reach, do not apply retroactively and defendant, therefore, could not take advantage of those amendments: The counterclaim should have been dismissed:

The first counterclaim alleged that this action was a strategic lawsuit against public participation (hereinafter SLAPP) and sought, among other things, attorney's fees, costs, and damages pursuant to Civil Rights Law § 70-a. * * *

Contrary to the defendant's contention, the broadened definition of public petition and participation in the amended section 76-a does not apply retroactively to this action … . The complaint, therefore, is governed by the prior statutory definition of an action involving public petition and participation … . Burton v Porcelain, 2024 NY Slip Op 00291, Second Dept 1-24-24

Practice Point: The 2020 amendments to the anti-SLAPP statute do not apply retroactively. Lawsuits started before the amendments cannot take advantage of the broader reach of the amendments.

JANUARY 24, 2024

CONTRACT LAW, MUNICIPAL LAW.

PLAINTIFF CONTRACTOR DID NOT POSSESS THE REQUIRED NYC HOME IMPROVEMENT CONTRACTOR'S LICENSE; THE CONTRACTOR'S BREACH OF CONTRACT ACTION SEEKING PAYMENT FOR THE RENOVATION WORK PLAINTIFF COMPLETED WAS PROPERLY DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, determined the plaintiff contractor was required to have a home improvement contractor's license by the New York City Administrative Code. Therefore plaintiff's breach of contract, unjust enrichment, account stated and quantum meruit causes action against the owner of the property plaintiff worked on was correctly dismissed. The First Department determined the LLC which owned the property was an "owner" within the meaning of the Administrative Code, and the contract was a home improvement contract within the meaning of the meaning of the code:

Obtaining a home improvement contractor's license is neither a ministerial act nor a mere technicality … . Rather, "strict compliance with the licensing statute [i.e. Administrative Code § 20-387] is required, with the failure to comply barring recovery regardless of whether the work performed was satisfactory, whether the failure to obtain the license was willful or, even, whether the homeowner knew of the lack of a license and planned to take advantage of its absence" … .

There is no dispute that plaintiff is a "contractor" for licensing purposes (see Administrative Code § 20-386[5]), and that plaintiff did not have a valid license. The controversy here essentially distills to whether defendant owners are "owners" within the meaning of Administrative Code § 20-387(a), and, if so, whether the agreement between the parties was a "home improvement contract" (Administrative Code § 20-386[6]). If the answer to both of those questions is yes, then plaintiff was required to have a home improvement contractor's license to recover for the work; if the answer to either question is no, then plaintiff did not need a license. KSP Constr., LLC v LV Prop. Two, LLC, 2024 NY Slip Op 00356, First Dept 1-25-24

Practice Point: A contractor who does renovation work in New York City without a NYC Home Improvement Contractor's license cannot sue for payment for the work.

JANUARY 25, 2024

CRIMINAL LAW, APPEALS, EVIDENCE, JUDGES.

THE PROSECUTOR AND THE JUDGE AGREED DEFENDANT'S ALFORD PLEA WOULD BE PREMISED ON HIS ABILITY TO APPEAL A GRAND-JURY EVIDENCE ISSUE; THE THIRD DEPARTMENT HELD SUCH CONDITIONAL PLEAS ARE GENERALLY NOT ACCEPTED IN NEW YORK; MATTER SENT BACK TO ALLOW DEFENDANT TO MOVE TO WITHDRAW HIS PLEA (THIRD DEPT).

The Third Department, sending the matter back for a motion to withdraw the plea (if defendant so chooses), determined County Court's telling the defendant he could appeal his claim that the grand jury was tainted by inadmissible hearsay was erroneous. Defendant, with the judge's and prosecutor's permission, decided to enter an Alford plea based on the understanding he could appeal the grand-jury-evidence issue. But the Third Department held that such conditional pleas are generally not accepted in New York and sent the matter back to allow defendant to withdraw the plea:

"As a rule, a defendant who in open court admits guilt of an offense charged may not later seek review of claims relating to the deprivation of rights that took place before the plea was entered," such as evidentiary or technical defects. Although defendant, the People and the court all agreed that defendant's Alford plea would be premised on the preservation of his right to raise these issues on appeal, conditional pleas such as this are generally not accepted in this state … , and the contentions he sought to preserve do not fall within the "extremely limited group of issues [that] survive[ ] the entry of a guilty plea" … . In this respect, we cannot overlook defendant's assertion that his decision to enter an Alford plea was predicated on County Court granting the People's motion to preclude his defenses and the corresponding promise that he could challenge that determination on appeal. Accordingly, as defendant is no longer receiving the full extent of his bargain, we remit the matter for County Court to allow defendant to withdraw his plea, should he elect to pursue that course … . People v Hafer, 2024 NY Slip Op 00341, Third Dept 1-25-23

Practice Point: Here defendant's Alford plea, with the permission of the judge and prosecutor, was conditioned on his being able to appeal a Grand Jury evidence

issue. The Third Department held that such conditional pleas are generally not accepted in New York. Defendant was allowed to move to withdraw his plea if he so chooses.

JANUARY 25, 2024

CRIMINAL LAW, EVIDENCE.

DEFENDANT SHOULD NOT HAVE BEEN DENIED ACCESS TO COMPLAINANT'S MENTAL HEALTH RECORDS AND SHOULD NOT HAVE BEEN PREVENTED FROM CROSS-EXAMINING COMPLAINANT ABOUT HER MENTAL HEALTH; CONVICTION REVERSED AND NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction in this sex offense trial, determined defendant should not have been denied access to the complainant's mental health records and should not been prevented from cross-examining the complainant about her mental health:

… County Court erred in denying the defendant any access to the complainant's mental health records … . Further, while the scope of cross-examination generally rests within the trial court's discretion … , here, the court improvidently exercised its discretion in sustaining the People's objections to the cross-examination of the complainant with respect to her mental health, particularly since the People's case primarily rested upon the complainant's eyewitness testimony … . Moreover, these errors cannot be deemed harmless since the evidence of the defendant's guilt, without reference to the errors, was not overwhelming, and it cannot be said that there is no reasonable possibility that the jury would have acquitted the defendant had it not been for the errors … . People v Nagle, 2024 NY Slip Op 00329, Second Dept 1-24-24

Practice Point: Defendant's conviction rested on the testimony of the complainant in this sex offense trial. Defendant should not have been denied access to complainant's mental health records and should not have been prevented from cross-examining complainant about her mental health. New trial ordered.

JANUARY 24, 2024

CRIMINAL LAW, JUDGES.

ALTHOUGH DEFENDANT ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, THE JUDGE SHOULD NOT HAVE COMMITED DEFENDANT TO SIX MONTHS IN A SECURE FACILITY PURSUANT TO CPL 330.20(6) WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant, who entered a plea of not responsible by reason of mental disease or defect, should not have been committed to a secure facility pursuant to CPL 330.20(6) based on a finding defendant suffers from a dangerous mental condition or is mentally ill without first holding a hearing:

The Supreme Court committed reversible error by issuing a commitment order without conducting an initial hearing pursuant to CPL 330.20(6) … . The court's obligation to provide the initial hearing pursuant to CPL 330.20(6) is mandatory … . At the initial hearing "the People must prove by a preponderance of the evidence that the defendant either suffers from a dangerous mental disorder or is mentally ill" … . Here, the court improperly made a finding that the defendant suffers from a dangerous mental disorder and committed him to a secure facility for six months without first conducting a mandatory hearing pursuant to CPL 330.20(6) and, thus, deprived the defendant of an opportunity to cross-examine the psychiatric examiners and to present his own testimony … . People v Anthony N., 2024 NY Slip Op 00328, Second Dept 1-24-24

Practice Point: Before a defendant can be committed to a secure facility for six months based upon a finding defendant suffers from a dangerous mental disorder or is mentally ill, the court must conduct a hearing.

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LANDLORD-TENANT, COOPERATIVES, MUNICIPAL LAW, TOXIC TORTS.

THE OWNER OF A COOPERATIVE BUILDING WAS PROPERLY FOUND LIABLE FOR FAILING TO REMEDIATE LEAD PAINT IN A SHAREHOLDER'S APARTMENT WHICH WAS SUBLET TO PLAINTIFF AND HER YOUNG DAUGHTER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, determined the owner of the building (Windsor) in which a cooperative shareholder, Sersch, sublet her cooperative apartment to plaintiff, had constructive knowledge plaintiff's young daughter was living with plaintiff. Plaintiff's daughter was diagnosed with lead poisoning and peeling lead paint was found in the apartment. Summary judgment finding Windsor liable for failing to remediate the lead paint problem was affirmed:

Windsor's agents' frequent and consistent interactions with plaintiff and the infant plaintiff were sufficient to provide constructive notice to Windsor … . Windsor failed to proffer an affidavit from any of the doormen stating that they did not know plaintiff and the infant plaintiff or were unaware of their residence. Under these circumstances, Windsor failed to raise a triable issue of fact as to the issue of constructive notice … . * * *

Windsor argues that section [NYC Administrative Code] 27-2056.15(c) exempts it from the duty to remediate and abate the lead paint in the apartment because Sersch "occupied" the apartment during plaintiffs' subtenancy. Here, the terms of the sublease and the stipulation of settlement clearly indicate that the apartment was not "occupied" by Sersch during plaintiffs' subtenancy. E.S. v Windsor Owners Corp., 2024 NY Slip Op 00267, First Dept 1-23-24

Practice Point; Here the owner of a cooperative building was deemed liable under New York City law for failure to remediate lead paint in a shareholder's apartment which had been sublet to plaintiff and her young daughter.

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NEGLIGENCE, EVIDENCE, MUNICIPAL LAW.

DEFENDANT DID NOT SUBMIT PROOF DEMONSTRATING WHEN THE AREA OF THE SLIP AND FALL WAS LAST INSPECTED BEFORE THE FALL; THEREFORE DEFENDANT DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION; THE VIDEO SUBMITTED BY THE DEFENDANT WAS NOT AUTHENTICATED SO IT SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT (SECOND DEPT).

he Second Department, reversing Supreme Court, determined defendant NYC Transit Authority was not entitled to summary judgment dismissing plaintiff's slip and fall action. Plaintiff alleged she slipped and fell on a wet substance on the floor of defendant's bus. The evidence of when the floor was last inspected was insufficient to show a lack of constructive notice. And the video submitted by the defendant was inadmissible because it was not authenticated:

> The deposition testimony of a dispatcher employed by the defendant merely referred to general pre-trip inspection procedures performed by drivers. The defendant failed to present any evidence regarding "specific cleaning or inspection of the area in question relative to the time when the subject accident occurred" … .
>
> Further, the defendant could not rely upon the video of the bus that it submitted on its motion so as to meet its prima facie burden, as the video was not authenticated, and thus, was not in admissible form … . Harrington v New York City Tr. Auth., 2024 NY Slip Op 00297, Second Dept 1-24-24

Practice Point: To demonstrate a lack of construction notice of the condition in a slip and fall case, the defendant must submit evidence of a specific inspection of the area close in time to the fall. Evidence of general inspection practices is never enough.

Practice Point: In order to submit a video in evidence, it must be authenticated.

JANUARY 24, 2024